No. 3917.

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JERRY SIMPSON,

*Plaintiff in Error,*

*v.*

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

*Appeal from the District Court for the District of Alaska, Division Number One, at Ketchikan.*

# OPENING BRIEF ON BEHALF OF APPELLANT



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## STATEMENT OF THE CASE

Appellant in error, Jerry Simpson, was found guilty in the United States Commissioner's Court at Ketchikan, Alaska, upon a complaint filed in said court as follows:

In the United States Commissioner's Court
at Ketchikan, Alaska.

United States of America,
*vs.*
Jim Simpson and Jerry Simpson.

Complaint for the violation of Section
Alaska Bone Dry Act, Public 308.

Jim Simpson and Jerry Simpson is accused by Fred Handy in this complaint of the crime of having intoxicating liquor in their possession, committed as follows: The said Jim Simpson and Jerry Simpson, at Ketchikan, Alaska, in the District of Alaska, and within the jurisdiction of this court, did on the 7th day of January, 1922, wilfully and unlawfully have concealed and in their possession and under their control intoxicating liquor, the same being in violation of the Alaska Bone Dry Act, Public No. 308, contrary

to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States.

(Signed) FRED E. HANDY.

United States of America,
District of Alaska, ss.

I, Fred Handy, being first duly sworn, depose and say that the foregoing complaint is true.

FRED E. HANDY.

Subscribed and sworn to before me this ninth day of January, 1922.

A. W. FOX,
United States Commissioner, and
*ex-officio* Justice of the Peace.

Tran. 1, 2.

From the judgment of said Commissioner's Court, the defendant, Jerry Simpson, appellant in error, appealed to the District Court for the Territory of Alaska, Division Number One, at Ketchikan, and upon a trial *de novo* in that court, was found guilty and sentenced to pay a fine of $700.00, and be confined in the federal jail at Juneau, Alaska, for four months.

Tran. 115, 116.

From the judgment and sentence of the District Court the defendant, Jerry Simpson, brings error to this court.

## ASSIGNMENTS OF ERROR

The court erred in overruling the demurrer to the complaint in the above entitled cause, for the reasons set forth in said demurrer.

Tran. 126.

The court erred in refusing to grant the petition of appellant to suppress the evidence obtained under the search warrant in the above entitled cause, for the reason that the affidavit upon which said search warrant was based did not show or pretend to state facts showing any probable cause to believe that this appellant had committed any crime or had in his possession any evidence of any crime so committed by himself or anyone else, and because, therefore, said search warrant was in violation of appellant's rights under the Fourth Amendment to the Constitution of the United States, and without foundation in law.

Tran. 126, 127.

## ARGUMENT

### Demurrer to the Complaint

The complaint upon which this prosecution is based was drawn under the provisions of the "Alaska Bone Dry Act."

It is our contention that the "Alaska Bone Dry

Act" was repealed by the Eighteenth Amendment to the Constitution and the National Prohibition Act.

In the case of *Abbate v. United States,* 270 Fed. 735, this court decided that the Alaska Act was not repealed by the National Prohibition Act.

The effect of the provisions of the Eighteenth Amendment upon the Alaska Act was not presented in that case, or passed upon by the court.

As to the effect of the National Prohibition Act in repealing the Alaska Bone Dry Act, we urge every objection made in the *Abbate case,* and adopt as our argument the dissenting opinion of Judge Ross.

But we rely mainly upon the provisions of the Eighteenth Amendment. The effect of these provisions upon the Alaska Bone Dry Act has never been presented or passed upon by this court, as far as we have been able to ascertain.

*EIGHTEENTH AMENDMENT*

> *Section* 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

> *Section* 2. The Congress and the several states shall have concurrent power to enforce this *article* by appropriate legislation.

We especially call the court's attention to the fact that Section 1, which declares the purpose and object of the amendment, expressly extends its operation to

> "The United States and all territory subject to the jurisdiction thereof"

while Section 2, in express terms confers the power of enforcing the Article, upon

> "The Congress and the several states."

The well known maxim,

> *Epressio unius est exclusio alterius*

applies here. Having conferred this power upon Congress and the several states, and omitting any reference to the territories, Section 2 is to be construed exactly as if the territories had been *in express terms* excluded from the exercise of the power to enforce "by appropriate legislation", the provisions of Section 1.

> Broom in his "Legal Maxims" says that no maxim of law is of more general and uniform application; and it is never more applicable than in the construction and ap-

plication of statutes. Whenever statutes limit a thing to be done in a particular form, it necessarily includes in itself a negative, viz: that the thing shall not be done otherwise.

19 Cyc. 23.

Story in his work on the Constitution, at Sec. 448, says:

"There can be no doubt that an affirmative grant of powers in many cases will imply an exclusion of all others. As, for instance, the Constitution declares that the powers of Congress shall extend to certain enumerated cases. This specification of particulars evidently excludes all pretentions of a general legislative authority. Why? Because an affirmative grant of special powers would be absurd, as well as useless, if a general authority is intended."

And in Section 1905, the same writer says:

"The next amendment is: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people". This clause was manifestly introduced to present any perverse or ingenius misapplication of the well known maxim that an affirmation in particular cases implies a negation in all

> others, and *e converso,* that a negation in particular cases implies an affirmation in all others. The maxim, rightly understood, is perfectly sound and safe."

In *Hepburn v. Ellzey,* 2 L. Ed. 442,

Chief Justice Marshall, referring to the several uses of the word "state" in the Constitution, and construing the meaning of that term, as used in the instrument, says:

> "These clauses show that the word state is used in the constitution as designating a member of the union, and excludes from the term of signification attached to it by writers in the law of nations."

In *Seaton v. Hanham,* R. M.. Charlt. (Ga.) 374, the court says:

> "After a most careful examination of this subject * * I have come to the conviction that the term "State", when used in the Constitution of the United States, is confined to a member of the American Confederacy; that it does not embrace a Territory of the United States; * * "

*Miners Bank v. Iowa,* 13 L. Ed. 867.
*Scott v. Jones,* 12 L. Ed. 181.
*New Orleans v. Winter,* 4 L. Ed. 44.

*Darst v. Peoria,* 13 Fed. 561.
*U. S. v. Ames,* 95 Fed. 453.

It is obvious that the Eighteenth Amendment confers upon Congress and the several states concurrent power to enforce its provisions within the several states, but that outside of the states, and within the jurisdiction of the United States, the power of enforcement is conferred exclusively upon Congress.

If this contention is correct, the Bone Dry Law of Alaska is invalid, and appellant's demurrer should have been sustained.

Our second assignment of error is based upon the action of the trial court in overruling the defendant's motion, made before any testimony was introduced, to suppress all testimony obtained by the government under an illegal and void search warrant.

Trans. 11, 12, 13.

The third paragraph of the motion is:

> "Because all evidence in this case was obtained by officers of the United States, after they had gained possession and control of this defendant's premises, while acting under a search warrant which did not in any manner describe or authorize a search of any premises belonging to or under the management or control of this defendant,

and while said officers remained in possession and control of this defendant's place of business, against his protest, after abandoning the search thereof, until such time as a new search warrant could be obtained, authorizing a search of property alleged to be under control of this defendant."

All the witnesses, except one, who testified as an expert to the nature of the liquor found on defendant's premises, were officers of the law, to wit: Fred E. Handy, a Deputy United States Marshal, (Trans. 15); T. W. McDonald, City Patrolman, Ketchikan, (Trans. 58); Lonnie McIntosh, Chief of Police, Ketchikan, (Trans. 75).

All of these officers participated in the search of defendant's premises.

The testimony of the witness Handy, Deputy United States Marshal, and in relation to the conduct of the search of defendant's premises, the testimony of all the witnesses was substantially the same, is that the officers entered and searched the defendant's premises by virtue of a pretended search warrant. Tran. 24. That this search lasted about an hour, or an hour and a half. Tran. 24. That on the advice of the District Attorney, he desisted from further search under this search warrant. (Tran. 24, 25). That thereupon a second search warrant was obtained

and the search resumed. (Tran. 27). This witness testified that during the interval—ten or fifteen minutes—between desisting from the search on the first warrant, and resuming the search on the second warrant the officers were away from the premises, but admitted on cross-examination, that in his testimony before the Commissioner he had stated that:

> "I asked Mr. Maltby for another search warrant, and he said he would get it, and he did. We stayed there—the police force and myself, and then later, when I searched the storeroom, etc." Tran. 26.

The Mr. Maltby referred to, was the District Attorney.

It is not very material, under the circumstances of this search, whether the officers remained on the premises or not.

The first search warrant is not in the record, but that it was deficient in failing to describe the premises searched seems to have been conceded throughout the trial. Tran. 12, 14, 17, 24, 28. At least, that was the opinion of the District Attorney, for upon no other ground can his advice to desist from continuing the search under it, be explained. The fact that the officers had entered and searched defendant's premises without legal warrant, is not cured by reason of the issuance of the second warrant and a

resumption of the search under it, even assuming that *that* was a legal one. The vice of the whole transaction lies in the fact that their testimony upon the trial, a material part of it, at least, was obtained by these witnesses while engaged in an unwarranted search . . . . . of the defendant's premises.

The case of *U. S. v. Boasberg,* 283 Fed. 305, is exactly in point.

The information upon which they obtained the second warrant and resumed the search, was obtained by the officers by an unlawful and illegal entry upon defendant's premises.

Their entire testimony should have been suppressed.

We make the further contention that the affidavit upon which the second search warrant was obtained, does not state facts showing probable cause.

Upon this point the affidavit is as follows:

> " * * deponent says * * * * he watched the premises * * * * and saw intoxicated men enter and leave said premises; that said deponent saw intoxicated men in said * * * premises and saw men deport themselves as under the influence of intoxication."

The vice of this allegation is that he

"saw intoxicated men enter"

the premises. This fact destroys the inference which might fairly be drawn from the statement that he saw men in the premises who deported themselves as under the influence of intoxication, and that he saw intoxicated men leave the premises. There is no statement that the intoxicated men whom he saw enter the premises were not the same men whom he saw leaving the premises, or the same men whom he saw on the premises who deported themselves as under the influence of intoxication, and there is no statement from which the inference can be drawn from seeing intoxicated men entering the premises, and seeing intoxicated men on the premises, that they obtained their means for becoming intoxicated upon the premises.

The most that can be said of this allegation is that the intoxicated persons mentioned *might* have become intoxicated while on the premises, and therefore established probable cause for believing that the means of intoxication was procured upon the premises. But the opposite inference, that the intoxicated men who were seen to enter procured the means of intoxication at some other place, and that they were the men referred to who left the premises in an intoxicated condition and the men who were in an intoxicated condition while on the premises is just as strong.

It is a rule in criminal pleading, and in this

particular we know of no reason why it should not prevail in the construction of an affidavit for a search warrant, that, where an essential allegation is capable of two constructions, only one of which imports guilt, the pleading is fatally defective.

*People v. Williams,* 35 Cal. 671.

Upon the general proposition as to a sufficient showing of probable cause to support the issuance of a search warrant, we cite:

*Giles v. U. S.,* 284 Fed. 208, and cases cited.
*Woods v. U. S.,* 279 Fed. 706.
*U. S. v. Boasberg,* 283 Fed. 305.

Respectfully submitted,

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